TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 79

UNITED STATES OF AMERICA, PETITIONER

vs.

THE F. & M. SCHAEFER BREWING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 8, 1957
CERTIORARI GRANTED MARCH 25, 1957

[fol. 1]

APPENDIX TO BRIEF FOR APPELLANT

CIVIL NO. 14715

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

THE F. & M. SCHAEFER BREWING CO.,
Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant

DOCKET ENTRIES

1954	
August 31	Complaint filed. Summons issued.
September 1	Summons returned and filed. Defendant served.
November 1	Answer filed.
December 29	Notice of Motion filed for summary judgment.
1955	
January 12	Abruzzo, *J.* Motion for summary judgment adj. to 2-9-55.
February 9	Rayfiel, *J.* Motion for summary judgment adj. to 2-23-55.
February 23	Rayfiel, *J.* Hearing on motion for summary judgment. Motion argued and submitted. Decision reserved. All papers in by 3-5-55.

[fol. 2]

1955

April 14	Rayfiel, *J.* Decision rendered on motion for summary judgment. Motion granted. See opinion on file.
May 24	Rayfiel, *J.* Judgment filed and docketed against defendant in the sum of $7189.57 with interest of $542.80 together with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment.
July 21	Notice of Appeal filed.
August 23	Record on Appeal certified.
"	Record on Appeal with three copies of Index mailed to Clerk of Court of Appeals.
August 26	Receipt from Court of Appeals filed re Record on Appeal.

* * * *

[fol. 16]

IN THE UNITED STATES DISTRICT COURT

MEMORANDUM DECISION—Filed April 14, 1955

Appearances: White & Case, Esqs., Attorneys for Plaintiff By E. W. Pabenstedt, Esq., for the motion Leonard P. Moore, Esq., U. S. Attorney for Defendant, by Elliot Kahaner, Esq., in opposition

RAYFIEL, *J.*

The plaintiff herein moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The parties agree as to the facts, which are as follows: the plaintiff, a New York corporation, had an authorized capital of 200,000 shares of $12 non-cumulative second preferred stock, without par value, having a stated value of $36.25 per share, and 6500 shares of common stock, the par value of which was $100 per share. Prior to March 21, 1951, there were, issued and outstanding, 100,000 shares

of the $12 non-cumulative second preferred stock and 1000 shares of the common stock. 100,000 shares of the said preferred stock and 1000 shares of the common stock were held as Treasury stock, and 4500 shares of the common stock were still unissued. The plaintiff's capital was $3,725,000.

On March 21, 1951, pursuant to appropriate action of its Board of Directors, the plaintiff increased the amount of its capital from $3,725,000 to $10,100,000. This was done by transferring the sum of $6,375,000 from its earned surplus account to its capital account. This bookkeeping entry increased the capital represented by each of the issued and outstanding 100,000 shares of no par value second preferred stock from $36.25 to $100 per share. No [fol. 17] additional shares were issued. At the same time the 100,000 shares of the preferred stock and the 1000 shares of common stock held by the corporation as Treasury stock were retired and cancelled.

The plaintiff did not affix any Federal documentary stamps to its stock books or other records. Subsequently, and after an examination of the corporation's books and records by agents of the Internal Revenue Service, a tax of $7012.50, together with interest in the amount of $177.07, was assessed against the corporation, pursuant to section 1802(a) of the Internal Revenue Code of 1939. The corporation paid the assessment, together with interest, and now sues to recover it on the ground that it was erroneously and illegally assessed and collected.

The facts in the case at bar are almost identical with those in the case of *U.S.* v. *National Sugar Refining Co.* 113 Fed. Supp 157, decided by Judge Leibell on April 30, 1953. He held that "Section 1802(a) is a tax on an original issue of capital stock. *It is not a tax on an addition to capital, made by a transfer from surplus to capital, where no new stock is issued.* The cases show that the stamp tax is, as L. Hand, *C. J.*, put it, 'an excise upon the act of issuance', to be imposed only once when the original certificate is issued. *Empire Trust Co.* v. *Hoey*, 2 Cir., 103 F. 2d 430 at page 432." (emphasis added). After an analysis of the pertinent regulations of the Internal Revenue Bureau (113.20, T. 26, Parts 80 to 169, C. F. R. 1949 edition) Judge Leibell stated, at

page 161, "The constant repetition of the words 'issue' and 'issued' in these Regulations emphasizes the point that it is when shares or certificates are issued that the stamp tax impinges on the transaction. An increase in the capital of a corporation by the transfer of part of [fol. 18] its earned surplus to the capital account for its outstanding shares of no par value stock does not require the corporation to pay a stamp tax under section 1802(a), if no shares or certificates are issued as part of the transaction. But if shares or certificates are subsequently issued against the increase in capital thus created, a stamp tax under section 1802(a) would, I believe, become payable. *Unless there are both the addition to capital and the issuance of new shares or certificates under the recapitalization, no stamp tax is payable under section 1802(a) as amended August 8, 1947.*

If the Congress had intended that a tax should be imposed on an increase of capital resulting from a transfer of earned surplus to capital it would have said so. If this fact situation constitutes an unforeseen 'loophole' in the tax structure, in particular section 1802(2) of the Internal Revenue Act, the Congress can take care of that also." (emphasis added).

I am in agreement with Judge Leibell's analysis and, accordingly, the plaintiff's motion is granted.

LEO F. RAFIEL,
United States District Judge

[fol. 19]

IN UNITED STATES DISTRICT COURT

JUDGMENT—May 24, 1955

The plaintiff having moved for summary judgment under Rule 56 R. C. P. and said motion having come on to be heard on February 23, 1955, and the parties having appeared and having presented their papers and arguments and after due consideration the plaintiff's motion for summary judgment having been granted on April 14, 1955, and the Court's opinion having been duly filed herein,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, The F. & M. Schaefer Brewing Co., recover of the defendant, United States of America, the sum of $7,189.57 and interest thereon from February 19, 1954 in the amount of $542.80, together with costs as taxed by the Clerk of the Court in the sum of $37, aggregating the sum of $7,769.37, and that plaintiff have judgment against defendant therefor.

APPROVED

Dated: Brooklyn, New York,
May 24th, 1955.

LEO F. RAYFIEL
U. S. D. J.

Judgment Rendered:

Dated: May 24th, 1955.
PERCY G. B. GILKES
Clerk

By: SIDNEY R. FEUER
Deputy Clerk

[fol. 20]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 21, 1955

NOTICE IS HEREBY GIVEN that the defendant, United States of America, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of United States District Judge Leo F. Rayfiel, entered in this action on May 25th, 1955, and froc each and every part thereof.

LEONARD P. MOORE
United States Attorney,
Eastern District of New York,
Attorney for Defendant,
271 Washington Street,
Brooklyn, New York.

By:
ELLIOTT KAHANER
Assisstant United States Attorney.

To:

PERCY G. B. GILKES,
CLERK, United States District Court,
Eastern District of New York,
271 Washington Street,
Brooklyn, New York

WHITE & CASE, Esquires,
Attorneys for Plaintiff,
14 Wall Street,
New York, New York.

[fol. 21]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
(Title Omitted)

NOTICE OF MOTION FOR DISMISSAL OF APPEAL—
Filed September 12, 1956

SIRS:

PLEASE TAKE NOTICE that, upon the memorandum decision (judgment) of the United States District Court for the Eastern District of New York filed on April 14, 1955, the notice of appeal filed on July 21, 1955, the annexed affidavit of Thomas C. Burke sworn to the 18th day of January, 1956, and all other papers on file herein, the undersigned will move this court at Room 1705, United States Court House, Foley Square, New York, New York, on January 20, 1956, at 10:30 o'clock A.M., or as soon thereafter as counsel can be heard, for an order dismissing the above-entitled appeal on the ground that appellant's notice of appeal was not timely filed pursuant to Rule 73(a), Federal Rules of Civil Procedure, and for such other and further relief as the court may deem just and proper.

Dated: New York, New York
January 18, 1956

Yours, etc.
WHITE & CASE
By /s/ Walter S. Orr
A Member of said firm,
Attorneys for
Plaintiff-Appellee,
14 Wall Street,
New York 5, N. Y.

To:

LEONARD P. MOORE, ESQ.,
United States Attorney,
Attorney for Defendant-Appellant
United States Post Office and
Court House Building,
Washington and Johnson Streets,
Brooklyn, New York

* * * *

[fol. 22]

AFFIDAVIT—To Notice of Motion, Etc.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

THOMAS C. BURKE, being duly sworn, deposes and says:

1. I am associated with the law firm of White & Case, attorneys for the Plaintiff-Appellee in the above-entitled action, and am familiar with the facts pertinent thereto.

2. This action, which is for refund of $7,189.57 stamp taxes, was commenced on August 31, 1954 by the filing of a complaint with the United States District Court for the Eastern District of New York. Defendant's answer was filed on November 1, 1954.

3. On December 29, 1954, plaintiff filed a notice of motion for summary judgment for the taxes in suit. Said motion came on for a hearing before the Honorable Leo F. Rayfiel on February 23, 1955.

4. On April 14, 1955, a memorandum decision (judgment) of the United States District Court for the Eastern District of New York (Rayfiel, J.) was filed, granting plaintiff summary judgment for the taxes in suit.

5. A formal judgment was filed on May 24, 1955.

[fol. 23] 6. Defendant did not file a notice of appeal until July 21, 1955, on which date a notice of appeal was filed by the defendant "from the order of United States District Judge Leo F. Rayfiel, entered in this action on May 24th 1955" (the formal judgment entered herein). Said notice of appeal was filed more than sixty days after the aforesaid memorandum decision (judgment) was filed.

WHEREFORE plaintiff prays that the appeal herein be dismissed on the ground that appellant's notice of appeal was not timely filed pursuant to Rule 73(a), Federal Rules of Civil Procedure.

/s/ THOMAS C. BURKE

Sworn to before me this
18th day of January, 1956

/s/ ROBERT A. PERKINS

Notary Public, State of New York
No. 41-8327500
Commission Expires March 30, 1956

[fol. 23a] (File Endorsement Omitted)

[fol. 24]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 152—October Term, 1955.

Argued January 20, 1956
Docket No. 23775

THE F. & M. SCHAEFER BREWING CO.,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Before:

CLARK, *Chief Judge*,
and
FRANK, MEDINA, HINCKS, LUMBARD, and WATERMAN,
Circuit Judges.

Appeal from the United States District Court for the Eastern District of New York, Leo F. Rayfiel, *Judge*.

The United States of America appeals from a summary judgment, D. C. E. D. N. Y., 130 F. Supp. 322, for the refund of stamp taxes paid it by The F. & M. Schaefer Brewing Co., and the latter moves to dismiss the appeal as not timely brought. Motion granted; appeal dismissed.

[fol. 25] THOMAS C. BURKE, New York City (White & Case, Walter S. Orr, and Edmund W. Pavenstedt, New York City, on the brief), *for plaintiff-appellee*.

KARL SCHMEIDLER, Atty., Dept. of Justice, Washington, D. C. (H. Brian Holland, Asst. Atty. Gen., and Ellis N. Slack, Atty., Dept. of Justice, Washington, D. C., and Leonard P. Moore, U. S. Atty., and Elliott Kahaner, Asst. U. S. Atty., E. D. N. Y., Brooklyn, N. Y., on the brief), *for defendant-appellant*.

OPINION—September 12, 1956

CLARK, *Chief Judge*:

The plaintiff sued to recover the amount of stamp taxes which it alleged the government had illegally assessed and collected from it. The transaction which the government claimed to be thus subject to the tax in question did not involve the issue of any new stock certificates, but was actually an increase in the corporation's capital account by the transfer of $6,375,000 from its earned surplus account to its capital account, thus increasing the capital from $3,725,000 to $10,100,000, and the value of certain issued no-par-value stock from $36.25 to $100 per

share. In a reasoned opinion, D. C. E. D. N. Y., 130 F. Supp. 322, Judge Rayfiel granted the plaintiff's motion for summary judgment for the refund, quoting and relying upon the detailed exposition in *United States* v. *National Sugar Refining Co.*, D. C. S. D. N. Y., 113 F. Supp. 157, where Judge Leibell held that stamp taxes are required only on the issuance of capital stock, and not on a bookmaking transfer assigning greater capital assets to already issued stock. But we do not reach the merits, since we dispose of the appeal on a motion made by ap-[fol. 26]pellee to dismiss it on the ground that it was not timely taken. Originally the issues were argued before a panel of this court consisting of Judges Medina, Hincks, and Waterman; but since the motion presented an important question of practice and procedure going beyond the fortunes of this particular case, we determined that adjudication should be made by the full personnel of active circuit judges.

The facts on which disposition of this issue turns are as follows: By its complaint filed August 31, 1954, the plaintiff-appellee alleged payment on February 19, 1954, of documentary stamp taxes in the amount of $7,189.57 and demanded "judgment against defendant in the sum of $7,189.57, interest and costs." The alleged payment was admitted in the defendant's answer. On December 29, 1954, the plaintiff moved for summary judgment upon three affidavits showing in detail the tax payment of $7,189.57, and the grounds upon which it had been compelled, and also that no refund or credit had been made thereon. On April 14, 1955, Judge Rayfiel signed the memorandum decision directed to said motion, which is reported in 130 F. Supp. 322-324 and which concludes: "I am in agreement with Judge Leibell's analysis and, accordingly, the plaintiff's motion is granted." Thereupon the clerk made a docket entry as follows: "April 14 Rayfiel, J. Decision rendered on motion for summary judgment. Motion granted. See opinion on file." On May 24, 1955, the judge signed a formal "Judgment," as submitted by the plaintiff, for the recovery from the defendant of "the sum of $7,189.57 and interest thereon from February 19, 1954 in the amount of $542.80, together with costs as taxed by the Clerk of the Court in the sum

of $37, aggregating the sum of $7,769.37." This document was stamped: "Judgment Rendered: Dated: May 24th, 1955. Percy G. B. Gilkes Clerk." Thereupon an entry was made in the clerk's docket as follows: "May 24 Rayfiel, J. Judgment filed and docketed against defend-
[fol. 27] ant in the sum of $7189.57 with interest of $542.80 together with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment."

The defendant filed its notice of appeal on July 21, 1955, or 96 days from the original grant of summary judgment and 58 days from the filing of the formalized judgment signed by the judge. Under F. R. C. P., rule 73(a) the United States has 60 days from "the entry of the judgment appealed from" in which to appeal, with a possible additional 30 days where granted by the district court upon a showing of excusable neglect in failing to learn of the entry. In our view the entry of judgment was on April 14, and the appeal is too late.

The goverminng principle is found in F. R. 58, which states as to non-jury cases: "When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs." In addition, F. R. 79(a) requires the clerk to keep a book known as a "civil docket," in which each civil action shall be entered with its file number and where "All papers filed with the clerk * * *, all appearances, orders, verdicts, and judgments shall be noted chronologically" on the folio assigned to the action. The rule continues: "These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation or an order or judgment shall show the date the nototion is made."

[fol. 28] The rules also make provision for formal judgments, F. R. 79(b), their form, F. R. 54(a),[1] and suitable indices thereto by the clerk, F. R. 79(c).

As we have held, these rules contemplate some decisive and complete act of adjudication by the district judge; when this is done, and notation thereof made in the civil docket, the judgment is complete without other formal documents which, if filed, are ineffective to delay the judgment or extend the time of appeal. See, e.g., *United States* v. *Wissahickon Tool Works*, 2 Cir., 200 F. 2d 936, the notation of a grant of summary judgment, as here; and see also *Leonard* v. *Prince Line*, 2 Cir., 157 F. 2d 987, 989; *Murphy* v. *Lehigh Valley R. Co.*, 2 Cir., 158 F. 2d 481, 485; *Binder* v. *Commercial Travelers Mut. Acc. Ass'n of America*, 2 Cir., 165 F. 2d 896, 901; *Markert* v. *Swift & Co.*, 2 Cir., 173 F. 2d 517, 519, n. 1; *Napier* v. *Delaware, Lackawanna & Western R. Co.*, 2 Cir., 223 F. 2d 28; *In re Nuese's Estate*, 15 N. J. 149, 152, 104 A. 2d 281, 282. The history of F. R. 58 and its amendments, designed to strengthen it, as stated in the footnote,[2] [fol. 29] demonstrate that this was the intent of the rule. Its purpose is also advanced—as we pointed out in *United States* v. *Roth*, 2 Cir., 208 F. 2d 467, 469—by Rule 10(a)

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[1] Compare forms of judgments, Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, October 1955, Forms 30 and 31, pp. 68-70.

[2] In the successive Notes to F. R. 58 appearing in the Preliminary Draft, May 1944, the Second Preliminary Draft, May 1945, and the Report of Proposed Amendments, June 1946, at page 76, there is a statement of the reasons for the changes made—including the express mandate that the "entry of the judgment shall not be delayed for the taxing of costs"—to obviate the following of local practice to the contrary in, notably, the Southern and Eastern Districts of New York. Citations are given to cases showing the federal law of long standing in general accord with the intent of the rule, with particular citation of *The Washington*, 2 Cir., 16 F. 2d 206, that failure of the clerk to enter judgment as thus required is a "misprision" "not to be excused." See also Report of Proposed Amendments, October 1955, F. R. 58, stating a further formula for the judge's direction of entry; and the forms of judgment, Forms 30 and 31, *supra* note 1, with accompanying notes separately citing and relying on *United States* v. *Wissahickon Tool Works*, 2 Cir., 200 F. 2d 936, and companion authorities cited *supra*.

of the Southern and Eastern Districts of New York, stating that a "memorandum of the determination of a motion, signed by the judge, shall constitute the order."[3] Hence here everything necessary to start the appeal time running occurred on April 14.

Appellant objects that the docket entry of April 14 does not show the "substance" of the decision. Quite obviously it is not self-contained in the sense that a casual and uninformed reader would know what adjudication had been made, or anything more than that a decision had been rendered granting the motion for summary judgment noted in earlier docket entries and that an opinion was available for the reading. But just as obviously, it was quite informative to the people really involved, the litigants, their counsel, and, indeed, the clerk. The face of the entry itself would tell them all they needed to know at once of the fate of the case and the necessity of appeal, while the material referred to in the entry would afford the precise details when needed by the clerk to prepare a formalized judgment file, or by the parties to arrange to collect or pay the judgment. As a form of communication, therefore, the notation is wholly adequate to inform those for whom it was intended. It serves its real and obvious purpose of showing to these interested persons that the judge had arrived at a decision; for it is this reflection of the judge's state of mind which is decisive. [fol. 30] Of course it lies in the judge's power to postpone finality whether because he has not yet reached the point of judgment or whether because he wants to take time—with the help of counsel or without—to embody the result in his own prepared judgment. But when he shows adjudication, F. R. 58 provides for its simple and quick signification without delay for the elaboration so often cherished by winning counsel. See *United States* v. *Roth*, *supra*, 2 Cir., 208 F. 2d 467, 470.

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[3] The complete rule reads as follows:

"Rule 10—Orders

"(a) A memorandum of the determination of a motion, signed by the judge, shall constitute the order; but nothing herein contained shall prevent the court from making an order, either originally or on an application for resettlement, in more extended form."

Thus to look for the expression of judicial intent affords a reasonably clear touchstone as to the meaning and validity of docket notations of judgments. Of course this principle may not settle every case if trial judges are not careful to make a clear disclosure of intent, as they certainly should be urged to do. But judicial uncertainty may well postpone judgment, while satisfaction of some mere formality should not. Hence it seems undesirable, as well as impracticable, to require more by way of specification of detail for the docket notation. As we have seen, the rules make a clear distinction between the judgment itself and the brief notation thereof in the docket. It surely is impracticable to require a full statement of every judgment, including, for example, the long detail of an injunction; that would destroy any utility of the docket as a quick and ready reference to show the activities had in a case, and would make it not a series of "brief" notations, but a duplication of the judgment book. And it would end any endeavor to speed final adjudication, but would force that to await the submission and acceptance of formally prepared judgments. On the other hand, any attempt to require less, but still some, detail beyond this manifestation of judicial intent would mean chaos and confusion as the poor clerks attempted to determine how much less would be enough. There could easily be more litigation over this side issue than [fol. 3f] over the adjudication itself. Consider questions which might arise as to the omission of references to interest and costs.[4] The rule as drafted provides a workable means of handling a matter otherwise not without practical difficulties; it also serves the function of avoiding such purely useless delays—reflecting upon the courts in these days of popular public interest in more speedy

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[4] Presumably any self-contained notation would need the inclusion of these important items, as in the last docket entry herein quoted above; but interest on a money judgment is mandatory, 28 U. S. C. §1961, *cf.* the forms cited *supra* note 1, and a judgment is not to be delayed for the taxation of costs, see *supra* note 2. This would mean that the clerk must be more precise than the judge in deciding, i.e., that the clerk must presume to go beyond the judge's holding in making up the notation. But see the cases cited *infra* note 7.

justice—as that of almost a year in *United States* v. *Wissahickon Tool Works, supra*, 2 Cir., 200 F. 2d 936, taken merely to cast the judgment made into more formal language.[5] It should not be rendered quite useless (so much so that practicalities would then suggest its repeal for the local state rule of no judgment until settled with counsel) by the interpretation urged. And the precedents are to the contrary. See *United States* v. *Wissahickon Tool Works* and companion cited *supra*;[6] also Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, October 1955, Rule 58, pp. 59, 60, Forms 30, 31, pp. 68-70 and notes thereto; and 6 Moore's Federal Practice § 58.03[1], note 5 (2d Ed. 1953), specifically approving as a docket notation, [fol. 32] "Judgment for plaintiff enjoining the defendant pursuant to the prayer of the complaint entered."[7]

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[5] Even longer delays have been observed, as where a worthless shell of a patent declared invalid has continued in nominal existence for two years pending a formal entry of judgment. So there was no practical reason for the 40 days' delay of the present case, invited by the plaintiff in submitting a superfluous form of judgment.

[6] Other cases have been so dismissed on the call of our motion calendar, save in a few instances where a 30-day additional period may be made available to an appellant under F. R. 73(a) and as noted in *United States* v. *Roth*, 2 Cir., 208 F. 2d 467, 471, at n. 1.

[7] Citing *Steccone* v. *Morse-Starrett Products Co.*, 9 Cir., 191 F. 2d 197, and *Willoughby* v. *Sinclair Oil & Gas Co.*, 10 Cir., 188 F. 2d 902, where notations of injunction judgments were quite abbreviated; and see also *In re Forstner Chain Corp.*, 1 Cir., 177 F. 2d 572, and *Porter* v. *Borden's Dairy Delivery Co.*, 9 Cir., 156 F. 2d 798, 799, as to judgments for defendants. In *United States* v. *Cooke*, 9 Cir., 215 F. 2d 528, 530, relied on by appellant, the judge's direction that judgment should enter "as prayed for in the complaint" was held sufficient, but the notation in the docket, "Filing decision (McLaughlin—Favor Plaintiff)" was held insufficient, as not telling what was granted, and the difference between that and the notation in the *Wissahickon* case was pointed out. Similarly in *Kam Koon Wan* v. *E. E. Black, Limited*, 9 Cir., 182 F. 2d 146, the notation was only for a partial judgment which could not even be final.

In general, since our own rulings have been so definitive, decisions from other circuits are not necessarily helpful, particularly because the language of a trial judge often needs to be interpreted

We conclude, therefore, that the practice heretofore sanctioned by us represents a correct interpretation of the governing rules, as well as a wise and practicable principle materially aiding in the expeditious determination of civil cases. Accordingly the appeal must be dismissed as not timely filed.

Motion to dismiss granted; appeal dismissed.

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against a local background, just as here we need to have in mind our local practice, including Rule 10 of the court below quoted in note 3 *supra*. But as we have just indicated, we have found no decision contrary as to the form and intent of the docket notation. With reference to the other point, namely, the effect of a judge's memorandum and direction when docketed as a judgment, there has been some division, three circuits—the First and Ninth and our own—supporting the view herein stated, while two others seem in varying degrees and not overclearly contrary. See *In re Forstner Chain Corp.*, *supra*, 1 Cir., 177 F. 2d 572; *Napier* v. *Delaware, Lackawanna & Western R. Co.*, *supra*, 2 Cir., 223 F. 2d 28; *Anderson* v. *Continental Steamship Co.*, 2 Cir., 218 F. 2d 84, 86; *Steccone* v. *Morse-Starrett Products Co.*, *supra*, 9 Cir., 191 F. 2d 197; but *cf. Healy* v. *Pennsylvania R. Co.*, 3 Cir., 181 F. 2d 934; *Brown* v. *United States*, 8 Cir., 225 F. 2d 861. See Commentary, *Entry of Judgment*, 18 Fed. Rules Serv. 927; and see also Report of Proposed Amendments, October 1955, p. 60, *supra* note 1, accepting the majority view as "declaratory of existing law" and recommending an amendment to carry it more clearly into effect.

[fol. 33]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: HON. CHARLES E. CLARK, *Chief Judge*; HON. JEROME N. FRANK, HON. HAROLD R. MEDINA, HON. CARROLL C. HINCKS, HON. J. EDWARD LUMBARD, HON. STERRY R. WATERMAN, *Circuit Judges*.

The F. and M. Schaefer Brewing Co.,
Plaintiff-Appellee

v.

United States of America,
Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of New York

JUDGMENT—Filed September 12, 1956

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from the judgment of said District Court be and it hereby is dismissed.

A. DANIEL FUSARO,
Clerk

[fol. 34] (File Endorsement Omitted)

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 36]

SUPREME COURT OF THE UNITED STATES
No. ....., October Term, 1956.

(Title Omitted)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—Filed November 30, 1956

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 9, 1957.

/s/ John M. Harlan
Associate Justice of the Supreme Court of the United States.

Dated this November 30/56.
day of ..... 1956.

[fol. 37]

SUPREME COURT OF THE UNITED STATES
No. 761 ....., October Term, 1956

(Title Omitted)

[fol. 38]

ORDER ALLOWING CERTIORARI—Filed March 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Whittaker took no part in the consideration or decision of this application.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 433025 74